NO. 90-813

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

v.

JIM MATTOX, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT-INTERVENOR HARRIS COUNTY DISTRICT JUDGE SHAROLYN WOOD

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QUESTION PRESENTED

Does Section 2(b) of the Voting Rights Act, 42 U.S.C. § 1973(b), as amended, apply to vote dilution claims in judicial election systems generally or as they relate to elections of trial judges from independent but overlapping, county wide districts?

LIST OF PARTIES

The participants in the proceedings below were:

Plaintiffs:

LULAC Local Council 4434
LULAC Local Council 4451
LULAC (Statewide)
Christina Moreno
Aquilla Watson
Joan Ervin
Matthew W. Plummer, Sr.
Jim Conley
Volma Overton
Willard Pen Conat
Gene Collins
Al Price
Theodore M. Hogrobrooks
Ernest M. Deckard
Judge Mary Ellen Hicks
Rev. James Thomas

Plaintiff-Intervenors:

Houston Lawyers' Association
Alice Bonner
Weldon Berry
Francis Williams
Rev. William Lawson
DeLoyd T. Parker
Bennie McGinty
Jesse Oliver
Fred Tinsley
Joan Winn White

Defendants:

Dan Morales, Attorney General of Texas
Jim Mattox, former Attorney General of Texas
George Bayoud, Secretary of State
Texas Judicial Districts Board

Thomas R. Phillips, Chief Justice, Texas Supreme Court
Mike McCormick, Presiding Judge, Court of Criminal Appeals
Ron Chapman, Presiding Judge, 1st Administrative Judicial Region
Thomas J. Stoval, Jr., Presiding Judge, 2nd Administrative Judicial Region
James F. Clawson, Jr., Presiding Judge, 3rd Administrative Judicial Region
John Cornyn, Presiding Judge, 4th Administrative Judicial Region
Robert Blackmon, Presiding Judge, 5th Administrative Judicial Region
Sam B. Paxson, Presiding Judge, 6th Administrative Judicial Region
Weldon Kirk, Presiding Judge, 7th Administrative Judicial Region
Jeff Walker, Presiding Judge, 8th Administrative Judicial Region
Ray D. Anderson, Presiding Judge, 9th Administrative Judicial Region
Joe Spurlock II, President, Texas Judicial Council
Leonard E. David

Defendant-Intervenors:

Judge Sharolyn Wood
Judge Harold Entz
Judge Tom Rickoff
Judge Susan D. Reed
Judge John J. Specia, Jr.
Judge Sid L. Harle
Judge Sharon Macrae
Judge Michael D. Pedan

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BRIEF FOR RESPONDENT-INTERVENOR HARRIS COUNTY DISTRICT JUDGE SHAROLYN WOOD

Because the *en banc* ruling of the Court of Appeals that § 2(b) of the Voting Rights Act does not apply to the election of state district judges is correct, Respondent-Intervenor Harris County District Judge Sharolyn Wood ("Judge Wood") respectfully requests that this Court affirm the Fifth Circuit's *en banc* Opinion.

OPINIONS AND JUDGMENT BELOW

Judge Wood incorporates by reference the Houston Lawyers' Association's ("HLA" 's) statement of opinions and judgments below. Brief for Petitioners (hereinafter "HLA Brief") at 1-2. However, she objects to the HLA's

inclusion in the appendix to the HLA's Petition for Writ of Certiorari (hereinafter "Pet. App.") at pp. 305a-308a of a letter from Assistant Attorney General John Dunne, dated November 5, 1990, interposing an objection to the creation of fifteen additional district judgeships in Texas under § 5 of the Voting Rights Act. That opinion letter is not part of the record of this § 2 case.[1]

JURISDICTION

Judge Wood incorporates by reference the HLA's statement of jurisdiction, HLA Brief at 2.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Judge Wood incorporates by reference the HLA's statement of statutory provisions involved. In addition, this case involves the fourteenth amendment to the United States Constitution, set out in the appendix to Judge Wood's Brief in Opposition to HLA's Petition for Writ of Certiorari (hereinafter "Wood App.") at pp. 5a-6a; the fifteenth amendment, set out in Wood App. at p. 7a; §§ 7 and 7(a)(i) of the Texas Constitution of 1876 set out in Wood App. at pp. 1a-2a; and, collaterally, § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, set out in Wood App. at pp. 3a-4a.

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1. Assistant Attorney General Dunne's letter was part of a proceeding filed by the Mexican American Bar Association to enforce the Justice Department's denial of preclearance. *Mexican American Bar Ass'n of Texas ("MABA") v. State of Texas*, 755 F. Supp. 735, slip op. NO. 90-CA-171, A-90-CA-1018 (W.D. Tex. Dec. 26, 1990) (1990 WL 25231(3)), *pet. cert. filed* (Feb. 27, 1991). A three-judge panel of the Western District of Texas decided that case adversely to MABA on December 26, 1990. A copy of the three-judge panel opinion in *MABA* is reprinted herein at 1a-26a as Judge Wood's Supplemental Appendix ("Wood Supp. App.") to these proceedings.

STATEMENT OF THE CASE

i. Course of Proceedings

This case was brought in the United States District Court for the Western District of Texas, Midland Division, by the League of United Latin American Citizens ("*LULAC*") and certain named black and hispanic individuals. The Plaintiffs, Petitioners in this Court, claimed that Texas' constitutional and statutory system for electing district judges from county-wide districts violated the fourteenth and fifteenth admendments to the United States Constitution, 42 U.S.C. § 1983, and § 2 of the Voting Rights Act by diluting the votes of blacks and/or hispanics in 47 (later reduced to 10) of Texas' most populous counties.

The case was tried to the bench in Midland, Texas, beginning September 18, 1989. On November 8, 1989, the district court issued its Memorandum Opinion and Order (the "Opinion"). The Court rejected the Plaintiffs' constitutional claims but held that Texas' system of electing state district judges diluted the votes of minorities in all target counties in violation of § 2 of the Voting Rights Act.

On January 2, 1990, without a hearing, the district court issued an Order (the "Order") enjoining the calling, holding, supervising and certifying of elections for state district judges under Texas' judicial election system in the target counties and imposed its own Interim Remedial Plan. That Plan, which took effect immediately, on the last day on which filing was permitted for judicial races under Texas law, totally rewrote Texas' comprehensive judicial election system set out in the Texas Government Code and Texas Election Code. It adopted virtually *in*

toto a remedial plan solicited by the district court and agreed upon by the Plaintiffs, HLA and Texas Attorney General Mattox without notice to the Defendant/Intervenors Judge Wood and Dallas County District Judge Harold Entz ("Entz"). The essential feature of that Plan was the assignment of state district judges to legislative districts—two judges to each predominantly Democratic district and one judge to each predominantly Republican district. The primary difference between the district court's Interim Remedial Plan and the Plaintiffs/Mattox's Plan was the substitution of non-partisan elections for partisan elections. Judge Wood strenuously opposed both the Interim Remedial Plan and the Plaintiffs/Mattox's Plan on fourteenth and fifteenth amendment grounds. Defendants appealed both from the injunction under 28 U.S.C. § 1291 and from the November 9 Opinion which the district certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

The Fifth Circuit Court of Appeals granted interlocutory review and enjoined imposition of the district court's Interim Plan. Following expedited oral hearing on April 30, 1990, a three-judge panel of the Fifth Circuit Court of Appeals ruled 2 to 1 in favor of the defense. The Court then ordered *en banc* review *sua sponte* and heard oral arguments on June 19, 1990. Of the thirteen judges who decided the case, twelve ruled that vote dilution claims under § 2(b) of the Voting Rights Act does not apply to state district judges.[2] A majority of seven judges, led by Judge Gee, held that the vote dilution provision in § 2(b) of the Voting Rights Act, added to the Act when it was amended by Congress in 1982, applies only to the election of "representatives" and therefore does not

2. The Plaintiffs did not appeal the district court's denial of their constitutional claims.

apply to judicial elections. The Fifth Circuit thus overruled a previous Fifth Circuit panel opinion in *Chisom v. Edwards,* 839 F.2d 1056 (5th Cir.), *cert. denied sub nom. Chisom v. Roemer,* 488 U.S. 955, 109 S. Ct. 390 (1988) which held § 2's vote dilution provisions applied to judicial elections. Five judges, led by Judge Higginbotham, held that § 2(b)'s vote dilution provisions apply to judicial elections in general but do not apply to single-judge trial benches. Only Judge Johnson dissented. On November 20, 1989 the HLA timely filed its Petition for Writ of Certiorari. LULAC filed a Petition for Writ of Certiorari on December 14, 1990. Both petitions were granted on January 18, 1991, and were consolidated for review by this Court.

ii. Statement of Facts

Judge Wood files this Statement of Facts to correct misstatements and misleading statements in the HLA Brief. Judge Wood regrets the length of this Statement but regards it as imperative to correct Petitioners' impression that Texas judicial elections are characterized by blatant discrimination. Petitioners claim that Texas' judicial election system is a numbered post, majority vote, "winner take all" judicial election system (HLA Brief at 8), and they imply that Texas district courts function statewide by reason of statewide jurisdiction (HLA Brief at 7). Contrary to Petitioners' implications, each state district court sits in a single-county or rural multi-county district with venue co-extensive with the electoral district, although jurisdiction technically extends to the State boundaries. Tex. Const. §§ 7 and 7(a)(f), Wood App. at 1a-2a. Moreover, Petitioners' characterization of the judicial election system as a "winner take all" system simply means that only one judge is elected to each bench:

judges do not share the power of their office. The largest vote-getter wins the seat, although, in fact, if more than two candidates run for one bench in the general election only a plurality, not a majority, is required to win. While all Texas district courts are courts of general jurisdiction under the Texas Constitution, the district courts in the larger counties, including Harris County, are either statutorily or by agreement divided into four areas of specialized expertize: civil, criminal, family, and juvenile courts. Thus, district judges in the largest counties expressly run for and are elected to a specific civil, criminal, family, or juvenile specialty bench.

Although Petitioners now acknowledge—as they did not in their Petition—that Texas has a *partisan* judicial election system, Petitioners omit and thus distort the effect of that partisan system on judicial elections. Under Texas' partisan judicial election system, both political parties hold primaries in accordance with the detailed requirements of the Texas Election Code. That Code sets out very detailed and comprehensive election procedures. Candidates of each party run for specific courts; if no candidate receives a majority in the primary, the two leading candidates face each other in a runoff; the winner of each primary or runoff then faces the other parties' candidates in the general election; and the winner of a plurality in the general election occupies the bench for four years. Each bench enjoys county-wide venue, jury selection, and docket equalization, and each judge enjoys independent authority as the sole decision-maker on each case that comes before him or her.

Principally because they ignore the distinctive features of a partisan election system—particularly one in which 97% of all blacks vote a straight Democratic ticket re-

gardless of the race of the candidates—and particularly because they relied almost exclusively on bivariate statistical analysis of selected black/white races as "proof" of discrimination—Petitioners grossly misrepresent the results of Texas state district judge elections.[3] By definition, a "bivariate" analysis takes into account only two variables —the race of the voters and the results of the election. Thus, if the actual cause of electoral results is straight-ticket party voting in which almost all blacks vote Democratic and the Democratic candidate loses, bivariate analysis will call that race racially polarized and, by implication, discriminatory. By then *selectively* analyzing *only* certain contested races in which a black Democrat ran against a white Republican (rather than a black Republican against a white Democrat or a black-supported white or hispanic Democrat against a white Republican) bivariate analysis can give the appearance of discrimination where none, in fact, exists and where it can be proved that statistically significant racial discrimination was not a factor in the race. That is exactly what happened in this case; and that is why Judge Wood has requested remand to consider standard of proof issues should this Court hold that § 2(b) vote dilution claims apply to the judiciary.[4]

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3. At trial HLA presented only claims on behalf of blacks in Harris County, Texas' most populous county, and Judge Wood defended the Texas judicial election system against those claims. Accordingly, the factual and statistical claims about judicial voting patterns in the HLA's brief and in this brief are confined to Harris County.

4. The United States Attorney General also seeks further consideration of facts under the statutory "totality of the circumstances" test as discussed in *Gingles*. Attorney General's *LULAC* Amicus Curiae Brief at 17-28; Attorney General's *Chisom* Brief at 34-35. The difference is that the Attorney General argues this as a reason for remand. Judge Wood seeks affirmance but is concerned that in the event of remand--no matter how unlikely—there be guidance

Relying on the manipulative statistical proof used in this case, Petitioners claim that "[a]lthough the population of Harris County is nearly 20% African American, and African American candidates have run in 17 contested district judge general elections in the County since 1980, only 2 of the African American candidates have won." HLA Brief at 5, 12. Petitioners further claim that white voters "never gave even a bare majority of their votes to an African American candidate," while black voters consistently gave more than 97% of their vote to African American candidates." HLA Brief at 11.

In fact, Petitioners' expert, Dr. Richard Engstrom, analyzed only 17 selected *contested* black/white elections in Harris County *since 1980*. He ignored the three 1978 district judge elections in which blacks ran—and won—contested races against a white candidate. Two of those black judges have run—and won—every four years since 1978. Only one of those four races was contested; therefore, Petitioners counted only that race. In addition, blacks have run in only 22 of the approximately 180 judicial races run in general elections for state district judge in Harris County from 1978 to 1989.[5] The black candidate won 7 of those races—4 contested and 3 uncontested—for a total success rate for black candidates of 32% in all races, and 18% in contested races. *See* Exh. DW-1; R. 242. Moreover, 11 of the 15 losses were attributable to only four candidates: Weldon Berry, Sheila Jackson Lee, Freddie Jackson, and Matthew Plummer. Exh. DW-1. In addition, no black district judge candidate has lost in the Democratic primary since 1984 except those running against other blacks. Exh. DW-2; R. 62. Thus the percentage of black wins is seriously understated by Petitioners.

as to the standard of proof and the political elements that are included within the "totality of the circumstances" under *Whitcomb* and its progeny.

5. The case was tried before the 1990 elections.

An even more egregious distortion is the HLA claim that blacks consistently gave 97% of their votes to black candidates while whites never gave even a majority of their votes to black candidates. In fact, the testimony at trial proved conclusively that black voters consistently gave 97% of their vote to *Democratic* candidates—whether the candidates were black or white. When the black candidate was a *Republican*, the black voters voted 95% against the black candidate and in favor of the white candidate. Since blacks invariably support Democrats, regardless of the candidate's race, and since 58% of Harris County's state district judges are Democrat, black-supported candidates have, in fact, won 58% of the time. Furthermore, the evidence is clear that those candidates could not have won without black support.

In an equally egregious distortion, the HLA claims, "Even straight ticket party voting and candidate incumbency failed to garner significant white votes for African American judicial candidates." HLA Brief at 11. They claim that in 1986 "*all* 16 white Democratic incumbents were re-elected. *All* three African American Democratic incumbents lost." HLA Brief at 11. They then imply that this claimed loss was due to the blacks having appeared in a photograph with white incumbents—making themselves easily identifiable targets of discrimination. HLA Brief at 11, n.13. In fact, *only one* incumbent black Democratic district judge ran (and lost) a contested race in 1986 (newly appointed Judge Matthew Plummer), while two incumbent black judges ran uncontested races and won—Judges Thomas Routt and Jon Peavy. Exh. DW-1.

The defense presented Dr. Delbert Taebel as an expert witness. In contrast to Dr. Engstrom, Dr. Taebel analyzed 41 white/minority judicial races in Harris County since 1980, including primary races, white/Hispanic races, and white/black races, mainly for state district judge. TR. 5-225; State Defendants' ("D") Exh. D-5. Dr. Taebel ran a "multivariate ecological regression analysis," factoring in party affiliation as well as race. He testified that he factored in party and included more races, including primary races, because the purpose of a functional analysis is to determine how the political process works. TR. 5-161-165. Dr. Taebel testified that no one can evaluate partisan elections using a functional approach without taking parties into account because party affiliation overwhelms any other factors in describing how partisan elections work. TR. 5-233.

Dr. Taebel testified that there are two ways to determine whether partisanship or race best describes actual voting patterns. TR. 5-185-186. If the party vote remains similar from race to race in a general election, there is a high degree of partisan voting. TR. 5-186. Also, if there is a shift in white support of a minority candidate between the primary election and the general election, the shift indicates dilution by partisan voting. TR. 5-186-187. The first of these tests shows that in *Harris County party voting by whites, blacks, and hispanics is exactly or almost exactly the same, regardless of the race of the candidates.* TR. 5-227. Also, since black Democrats and white Democrats vote substantially the same in Harris County, TR. 5-268, it follows that under the second of these tests that *any dilution of the vote for a black Democrat between the primary and the general election is due to dilution by Republican votes, not white votes.*

Dr. Taebel testified that Harris County voting is very competitive between Democrats and Republicans and election results are unpredictable.[6] TR. 5-226. There is extensive straight-party voting. TR. 5-183; TR. 5-228. The swing voters, who constitute only 10-20% of the judicial voters, are a critical factor and vote in a variety of different ways. TR. 5-228-229. However, swing voting in Harris County has little or nothing to do with race. TR. 5-232-233. Thus it is simply incorrect as a matter of fact to attribute black losses in judicial races in Harris County to racial bloc voting.

Dr. Taebel's testimony was corroborated by numerous witnesses for both sides who testified to the importance to electoral success or failure in Harris County of specific factors such as straight party voting (TR. 3-220 and 3-325), the Democratic sweep in 1982 (TR. 3-256) and the Republican sweep in 1984 (TR. 3-294, 4-40), the importance of bar poll results in 1986 and 1988 (TR. 3-319, 3-325, 4-56, 5-129), incumbency (TR. 3-325), and the effectiveness of particular campaign strategies (TR. 3-294). Studies commissioned by the Democratic judges in 1986 (including Plaintiff Matthew Plummer), made by Dr. Richard Murray, authenticated by him in deposition testimony, and introduced into evidence by the defense, also rejected racism as the cause of the 1986 loss by three incumbent black judges[7] (only one of whom, Judge Plummer, was a district judge), citing other factors such as their being relatively unknown and unable to raise funds, their concentration on seeking only minority

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6. Except in 1984 when straight ticket Republican judicial voters were sufficiently numerous to win all contested benches—no matter what the race of the Democratic candidate.

7. These are the same three judges discussed by HLA. HLA Brief at 11.

support, low black voting, and their failure to obtain the endorsement of the Gay Political Caucus. TR. 2486-89; Exh. DW 15 at 15-17. In addition, although the HLA presented witnesses who testified that black losses in Harris County campaigns are due to racism, none could point to any racist element in his or her own campaign. *See, e.g.*, testimony of former Judge Weldon Berry, TR. 4-55. Judge Manuel Leal testified that his Republican party affiliation, and not racial voting, caused his loss in 1982. TR. 4-246. Finally, Harris County District Clerk Ray Hardy testified by deposition summary that racism does not play a part in Harris County district judge races and has not done so in at least the last 15 years. TR. 4-255.

Petitioners state that "the district court's findings with respect to racially polarized voting were based on the dramatic results of the experts' analysis." HLA Brief at 10. Petitioners neglect to mention, however, that the district court expressly held that two of the essential elements of a vote dilution claim—political cohesiveness and ability of the white majority usually to defeat the minority's preferred candidate—are proved only by statistical evidence of racially polarized voting, that testimony regarding party affiliation and the actual local factors that determine election outcomes while "credible" is "irrelevant" under controlling law and "legally incompetent" (Pet. App. at 222a-223a) and that "the addition of irrelevant variables [to regression or statistical analysis] distorts the equation and yields results that are indisputably incorrect under § 2." Pet. App. at 287a.[8] Thus the

8. In stating that the addition of irrelevant variables to statistical analysis distorts the equation, the district court was relying on a non-causal, statistical-based standard of proof of vote dilution set out in a minority section of *Thornburg v. Gingles*, 478 U.S. 30, 64, 106

"dramatic results" held by the district court to prove white bloc voting and racially polarized voting were strongly challenged by Judge Wood on appeal, both on evidentiary grounds and on standard of proof grounds.

SUMMARY OF THE ARGUMENT

This case presents three vital questions, each of which has both statutory and Constitutional implications. The vote dilution claims under § 2(b) apply to state judicial elections at all or (2) to the election of judges to independent benches of general jurisdiction. The third (3) asks whether a standard of proof of vote dilution is proper if it excludes as "legally incompetent" virtually all evidence of the actual local factors operative in judicial elections and determines the existence of discrimination solely on the basis of statistical evidence of minority losses. The Fifth Circuit answered both of the first two of these questions affirmatively. Since it held that vote

S. Ct. 2752 (1986), the only case in which this Court has previously interpreted § 2 of the Voting Rights Act.

As the Court is well aware, *Gingles* requires minority plaintiffs to meet an initial threshold burden of proving (1) that the minority is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that the minority is politically cohesive; and (3) that "the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances . . . usually to defeat the preferred candidate of the minority." 478 U.S. at 50-51.

The minority section, Part III-C, in which Justice Brennan endorsed a non-causal statistics-based standard of proof of vote dilution, was expressly rejected by five members of this Court, all of whom expressed concern over its potential for distorting electoral results and/or introducing a proportionality requirement into § 2—in contradiction of both the express wording of the section and its case history and legislative history. *See Gingles*, 478 U.S. 82-83 (White, J., concurring in part and dissenting in part), 478 U.S. 84-105 (O'Connor, J., concurring in the judgment only). Judge Wood treated this subject exhaustively below in her Appellate Brief at 24-39.

dilution claims under § 2(b) do not apply to judicial elections, it failed to reach the third issue. If this Court affirms the Court of Appeals, this issue will have to be resolved later. Respondent Judge Wood therefore urges the Court at least to review, if not to decide, the standard of proof issue.

Petitioners' threshold argument that the inapplicability of § 2 to the judiciary gives states free rein to discriminate in judicial elections is both wrong and disingenuous: this case deals only with vote dilution claims brought under § 2(b) and claiming non-intentional discrimination. Vote dilution claims in judicial elections are beyond the scope of § 2(b) of the Voting Rights Act, which guarantees protected classes the right "to elect representatives of their choice," since judges are not "representatives" within the meaning of § 2(b). Application of § 2(b)'s vote dilution provisions to judicial elections violates fundamental legal rights and principles. Judge Higginbotham's concurrence elaborates upon the special considerations in the election of trial judges that make the equitable and constitutional application of § 2 to such elections impossible. Petitioners' claim that § 2 of the Voting Rights Act must be broadly construed to apply to judicial elections because it is coextensive with § 5 is erroneous. Petitioners' claim that the United States' Attorney General's interpretation of the Voting Rights Act is compelling evidence of the meaning of the Act is also erroneous. Petitioners' essential claim—that protected classes are entitled to proportional representation in the state judiciary—is precluded by the terms of the Act itself. The *en banc* majority opinion of the Fifth Circuit Court of Appeals in this case should, therefore, be affirmed.

ARGUMENT

I. PETITIONERS' THRESHOLD ARGUMENT THAT THE INAPPLICABILITY OF § 2 TO THE JUDICIARY GIVES FREE REIN TO DISCRIMINATE IN JUDICIAL ELECTIONS IS BOTH WRONG AND DISINGENUOUS.

Petitioners' argument is tainted by the prevasive implication that unless this Court declares that § 2 applies to the judiciary, states will be given a free reign to discriminate in judicial elections.[9] This claim is simply false; and the Fifth Circuit *en banc* majority opinion went to great lengths to demonstrate why such inflammatory claims are mistaken.

While Petitioners give the impression that the Fifth Circuit held that § 2 does not ever apply to the judiciary, that is not the case. The Fifth Circuit, in fact, interpreted only part of § 2(b) of the Voting Rights Act, which was added to § 2 when it was amended in 1982.[10] Judge Gee in his majority opinion expressly observed that the court's

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9. *See, e.g.*, HLA Brief at 34 ("If the concurrence's analysis is right, then a state's decision to set up its trial bench specifically to ensure the African-Americans have no say in the process of electing judges would be immunized from attack under § 2").

10. The relevant passage from the Act provides,

> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect *representatives* of their choice. . . .

42 U.S.C. § 1973(b) (emphasis added).

inquiry was limited to the question whether the language in § 2(b) prohibiting discriminatory practices in the election of "representatives" could be applied to the judiciary. Pet. App. at 12a. The effect of this limitation, as the Court stated, was to restrict the Fifth Circuit's opinion to a ruling on the issue whether vote dilution claims can be brought in judicial elections. Pet. App. at 28a. As the Court observed,

> Both the broad and general opportunity to participate in the political process and the specific one to elect representatives are . . . treated in the new section. As for the former, protecting it appears to involve all of the primal anti-test, anti-device concerns and prohibition of original Section 2; and its provisions may well extend to all elections whatever, as did they. These broader considerations center on the voter and on his freedom to engage fully and freely in the political process, untrammeled by such devices as literacy tests and poll-taxes. Where judges are selected by means of the ballot, those safeguards may apply as in any other election, a matter not presented for decision today.

Pet. App. at 13a. The court further observed,

> [A]s we have noted, *it is only the application of the results test portion of amended Section 2 to vote dilution claims in judicial elections that is at issue today. Other portions of the section may well apply to such elections*, as may the results test to claims other than those of vote dilution, along with the indubitably applicable Constitutional prohibitions against any intentional act of discrimination in any electoral aspect.

Pet. App. at 28a (emphasis added).

In addition, the Court noted,

> that there can be no doubt whatever that the provisions of the Fourteenth and Fifteenth Amendments, enforceable by means of Section 1983 actions, apply to judicial elections to forbid intentional discrimination in any of them.

Pet. App. at 12a, n.6. The Fifth Circuit's ruling is thus limited to one specific type of discrimination claim—although a very important one—the claim that the votes of a protected class can unintentionally be diluted through a state's structure of its judicial election system, in violation of § 2.

II. VOTE DILUTION CLAIMS IN JUDICIAL ELECTIONS ARE BEYOND THE SCOPE OF § 2(b) OF THE VOTING RIGHTS ACT SINCE JUDGES ARE NOT "REPRESENTATIVES" WITHIN THE MEANING OF § 2(b).[11]

The State of Texas has spoken repeatedly and clearly to the issue of judicial accountability to *all* the voters:

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11. The HLA has taken strategic advantage by incorporating by reference arguments made against the majority opinion in *LULAC* by the Petitioners in *Chisom v. Roemer*, No. 90-747, a separate case consolidated by the Court for oral hearing with this case. Since Respondents sought and obtained the majority opinion in the main action of *this* case (*LULAC v. Clements*, No. 90-974), and since it properly should be argued in *this* case—not *Chisom*—Judge Wood will respond to the arguments against the majority opinion in *LULAC* which were relegated by Petitioners to their *Chisom* Brief and were incorporated by reference only in the HLA Brief. Judge Wood would also point out to the Court that by filing over-long briefs in both cases (62 pages for the HLA Brief and 65 pages for the *Chisom* brief), Petitioners have allowed themselves a combined total of 127 pages of argument to which Respondent Wood is required to reply in 50 pages. Her argument, therefore, necessarily must summarize certain points where Petitioners can allow themselves the luxury of detail.

whenever Texans of all colors have been given the opportunity to express their own preferences they have voted overwhelmingly—both in the legislature and in referenda —for an elected state judiciary in which each judge is responsible to every voter in his judicial district and each district at the trial court level is community-wide, not drawn to serve any one racial group, religious group, or any other special interest. This is Texas' interpretation and implementation of its fundamental state interest in structuring the state judicial system. It is supported both by the traditional concept of the role of judges and judicial systems as distinct from the roles of representatives and representative governmental bodies—such as state legislatures, city councils and school boards—and by fundamental legal principles of federalism, due process, and equal protection.

There is no support in either the plain language interpretation of the terms "representatives" and "judges" or in the legislative history of the 1982 amendments to the Voting Rights Act for Petitioners' claim that judges are "representatives" of racial groups. Indeed, the attempt to force judicial elections to conform to structures established for "representative" government leads to intractable constitutional and practical problems which Petitioners attempt to wish away by arguing superficially that judicial elections are just like all other elections (HLA Brief at 40-45) and that Congress' judgment in providing a mechanism in the Voting Rights Act for remedying discrimination overrides any and all other considerations, including *any* state's interest in even the most fundamental features of its governmental structures (HLA Brief at 45-49).

A. The Plain Language of § 2(b) Restricts Vote Dilution Claims to the Election of "Representatives."

The Fifth Circuit's *en banc* majority opinion below thoroughly analyzed and resoundingly rejected Petitioners' claim that the "plain language" of § 2 requires its application to the judiciary. Pet. App. at 7a-19a. *See* Brief for Petitioners in *Chisom v. Roemer*, No. 90-754 (hereinafter the "*Chisom* Brief") at 27-28; HLA Brief at 21-22. The Fifth Circuit majority began by observing that § 2 should not be pushed beyond its clear language "because of the highly intrusive nature of federal regulation of the means by which states select their own officials." Pet. App. at 3a. Carefully examining the text of § 2(b) and its genesis in *White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332 (1973), the Court analyzed the background to the 1982 amendments to the Act, paying particular attention to the origin of the results test in legislative redistricting actions and to the traditional (indeed, prior to 1982, the universal) interpretation of the term "representative" by the courts as a term exclusive of the judiciary. Pet. App. at 9a-17a. It concluded that, in revising § 2 in 1982 to incorporate the "results" test promulgated in *Whitcomb v. Chavis*, 403 U.S. 124, 91 S. Ct. 1858 (1971) and *White*, Congress intended to extend that test no further than the legislative and executive branches and selected its language carefully to reach that result. Pet. App. at 4a.

Petitioners argue the legislative history of the 1982 amendments to the Voting Rights Act at length. *Chisom* Brief at 32-42. In the short space available to her, Judge Wood cannot replicate their detailed argument. However, she urges the Court to review the same subject as set out

in careful detail in the Fifth Circuit *en banc* majority opinion. Pet. App. at 9a-13c. In addition, Judge Wood would direct the Court to Senate Report 97-417, Congress' official statement of the history and purpose of the 1982 amendments to the Voting Rights Act.

Senate Report No. 97-417 states,

> The objectives of S. 1992 as amended are as follows: (1) to extend the present coverage of the special provisions of the Voting Rights Act, Sections 4, 5, 6, 7 and 8; (2) to amend Section 4(a) of the Act to permit individual jurisdictions to meet a new, broadened standard for termination of coverage by those special provisions, (3) *to amend the language of Section 2 in order to clearly establish the standards intended by Congress for proving a violation* of that section.

S. Rep. No. 417, 97th Cong. 2d Sess. 2, *reprinted in* 1982 U.S. CONG. & ADMIN. NEWS at 178 (emphasis added). Thus, although Congress could have stated that it intended to extend or expand the coverage of § 2, it did not. Instead, it expressly stated that its intent was to *clarify* the standard of proof of a § 2 violation.

Senate Report 97-417 goes on to explain that the amendment to § 2

> is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. It thereby *restores* the legal standards, based on the controlling Supreme Court precedents, which applied in voting discrimination claims prior to the litigation involved in *Mobile v. Bolden. The amendments also adds a new subsection to Section 2 which delineates the legal standards under the results test by codifying the leading pre-Bolden vote dilution case, White v. Regester.*

S. Rep. No. 417, 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S. CONG. & ADMIN. NEWS at 179. Thus the amendment neither expands nor contracts the scope of § 2; instead, it expressly *restores* the prevailing standard of proof prior to *Bolden* and *codifies* the standard of proof set out by the Supreme Court in *White v. Regester*, a pre-*Bolden* legislative redistricting case.[12]

Given the apparent care taken in the choice of the word "representative" in § 2(b), it makes a mockery of customary canons of statutory construction to argue, as Petitioners do, that this careful specificity should give way to the general definition of the term "voting" in 42 U.S.C. § 1973*l*(c)(1). HLA Brief at 22; *Chisom* Brief at 17-29. First, in regard to the Voting Rights Act generally, Petitioners' interpretation would preclude any limited language in any section of the Act having any effect whatsoever so long as the word "vote" or "voting" was used in the section. In regard specifically to vote dilution claims under § 2, Petitioners' interpretation would have even those "candidates for public or party office" § 2 vote dilution claims cover to which the concept of vote dilution obviously *cannot* apply, such as, for example, candidates for mayor, county superintendent of education, administrator, sheriff or tax collector. It is therefore not true that the "plain language" of § 2 extends to judges

12. *Mobile v. Bolden*, 446 U.S. 55, 100 S. Ct. 1490 (1980), had declared that proof of intent to discriminate was necessary to establish a claim under § 2. *White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332 (1973), established a "results" test of vote dilution claims derived from *Whitcomb v. Chavis*, 403 U.S. 124, 91 S. Ct. 1858 (1971).

simply because judges are candidates for public office, as Petitioners claim.

B. Treating Judges as "Representatives" for the Purposes of § 2(b) but Not for Purposes of the Application of the Equal Protection Clause and the One-Person, One-Vote Principle Makes a Mockery of Sound Statutory and Constitutional Construction.

Petitioners claim that "the fact that one-person, one-vote rule does not apply to judicial elections is irrelevant to the application of the Voting Rights Act to the election of judges." HLA Brief at 23; *Chisom* Brief at 43-49. Petitioners allude to this Court's affirmance of *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973).[13] Petitioners have a strong interest in the applicability of the one-person, one-vote principle to judicial elections since many (if not all) of their proposed remedies for vote dilution—including the Interim Plan proposed by Petitioners and adopted by the district court in the instant case—fail to satisfy that principle. *See supra* at 4. Nevertheless, the argument that that fourteenth amendment principle is irrelevant to the interpretation of a statute (§ 2) which derives its validity from the fourteenth and fifteenth amendments is absurd.

In expounding the "plain meaning" of the term "representative," the Fifth Circuit majority paid particular attention to *Wells*. *Wells* held that the one-person, one-vote principle does not apply to the judiciary since,

13. *See Rogers v. Lodge*, 458 U.S. 613, 617, 102 S. Ct. 3272 (1982) (tracing the authority for holding vote dilution claims unconstitutional to the equal protection clause of the fourteenth amendment).

> "Judges do not represent people, they serve people." Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary.
>
> "The State judiciary, unlike the legislature, is not the organ responsible for achieving representative government."

Pet. App. at 18a (quoting *Wells*, 347 F. Supp. at 455-56). The Fifth Circuit stated,

> It is impossible, given the single point at issue and the simple reasoning stated, to believe that the majority of the Supreme Court, in affirming *Wells*, did not concur in that reasoning.

Pet. App. at 19a. Thus, according to the Fifth Circuit *en banc* majority, the very justification for the non-applicability of the one-person, one-vote principle is the non-"representative" nature of the office of a judge.

The Fifth Circuit majority substantiated its conclusion by a thorough analysis of the genesis of the concept of vote dilution in legislative apportionment cases brought under the equal protection clause of the fourteenth amendment. As the majority opinion points out, the concept of *individual* vote dilution was first developed by this Court in the legislative apportionment case of *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964), which provided a standard of measure and a remedy for individual vote dilution by promulgating the doctrine of one-person, one-vote under the constitutional authority of the fourteenth amendment. Pet. App. at 21a. Subsequently, the concept of one-person, one-vote provided the foundation for the

concept of *minority* vote dilution elaborated in *Whitcomb* and *White*. Pet. App. at 21a. Thus, both the general concept of individual vote dilution and the specific concept of minority vote dilution are integrally related to the concept of one-person, one-vote. Moreover, *Thornburg v. Gingles*—the only case in which this Court has reviewed the concept of minority vote dilution since the Voting Rights Act was amended in 1982—presupposes that the one-person, one-vote principle applies to elections covered by § 2 and builds into the test for vote dilution a potential remedy through the use of single member districts in which the aggrieved minority can constitute a majority. *See supra* at footnote 8.

In light of *Reynolds*, *Whitcomb*, *White* and *Gingles*, the Fifth Circuit found itself compelled to conclude that vote dilution analysis can only be meaningful in cases in which the principle of one-person, one-vote applies. Indeed, it correctly observed that without the individual right of one person to one equally-weighted vote there is no standard of appropriate individual vote strength against which to measure alleged dilution; hence a court "can fashion no remedy to redress the non-existent wrong complained of." Pet. App. at 20a-21a. Thus, if a court acknowledges the holding in *Wells* that the one-person, one-vote standard does not apply to the judiciary, it must logically conclude, as the Fifth Circuit did, that "judicial elections cannot be attacked along lines that their processes result in unintentional dilution of the voting strength of minority members." Pet. App. at 20a.

Furthermore, any court which interprets § 2 of the Voting Rights Act must conclude that the one-person, one-vote principle *must* apply to all legitimate claims

within the scope of the Act since a construction of a statute which conflicts with the constitutional principle from which the statute derives its legitimacy is void. *See Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60, 74 (1803). Thus there is only one reasonable interpretation of § 2(b) which reconciles the requirement of the fourteenth amendment that the one-person, one-vote principle apply to vote dilution claims brought under the statute and the holding of this Court that the one-person, one-vote principle does not apply to judicial elections: namely, that judicial elections (like elections to any other non-representative office) fall outside the scope of the vote dilution provision of § 2(b). This interpretation is not only rational but sound in terms of the actual structure of judicial election districts, which serve many legitimate and indeed fundamental concerns having nothing to do with either equally-weighted voting or minority voting rights.

C. The Attempt to Treat Judges As "Representatives" Entails Intractable Practical and Constitutional Problems.

In actuality, the term "representatives" in § 2(b) of the amended Voting Rights Act *cannot* include judges without leading to impractical or unreasonable results which are plainly at odds with Congress' comprehensive civil rights policies. The problem arises because, in fact, judges are *not* "representatives" within the ordinary meaning of the word. Judges do not represent the special interests of any constituency and certainly not the special interests of any racial group. Their function is to administer justice fairly, efficiently and impartially for all, and for that reason judicial districts have never been drawn

in such a way as to give recognition to the special interests of any group of citizens in the community. Instead, in Texas, judicial districts have traditionally been drawn to ensure that all citizens who are likely to come before a court have a say in the election of each one of the court's members. In general, the effort has been to see that jurisdiction, venue, and jury selection extend over a wide enough area to achieve fairness and to minimize forum-shopping and the control of courts by small, tight-knit special interest groups, and yet to provide for efficient administration of case loads.

The function of courts has always been to ensure equal protection under the law and due process for all, and judicial election schemes have been tailored to serve those ends. When judges are held to be "representatives," the interlocking web of jurisdiction, venue, docket control, jury venire, and indeed the accountability of judges to their electorate, is subordinated to the notion that the special interests of minority voters should be given particular attention—even though no one has ever explained what special interests of minority voters require "representation" in the judiciary or in what way the elected judiciary fails to respond to minority interests.[14]

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14. Interestingly, Judge Johnson, the lone dissenter from the *en banc* Fifth Circuit's holding that § 2 does not apply to trial judges, stated in his dissent from the hearing panels' majority opinion:

> When weighing a state's claim that it has a compelling interest in retaining the existing at-large system, courts should keep in mind the common sense notion that the role of judges differs from that of legislative and executive officials. Since it is not the role of judges to "represent" their constituents an examination of the "responsiveness" of the elected official to minority concerns is clearly irrelevant.

Slip op. at 21. The obvious question is how § 2 can be said to apply to the judiciary at all if its most ardent proponents concede that judges do not "represent" their constituents and judges are not elected to be responsive to minority concerns.

The district court in *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988), which had been forced by the Fifth Circuit's ruling in *Chisom* (later overruled by *LULAC*) to apply § 2 to the judiciary against its own better judgment, expressed the problem succinctly:

> Although the Court of Appeals squarely held in *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988), that elections for judicial office are subject to Section 2, it cannot be gainsaid that judicial elections are different from other, particularly legislative, elections. Judicial districts are created, not by reason of population, but for the purpose of the administration of justice in a particular jurisdiction. Judgeships are added, not because of population, but because of caseload. The boundaries of district courts are jurisdictional, not related to population. Judges are charged, not with making legislative or social policy, but with the duty of deciding individual cases according to the law, *even when it is unpopular to do so.*

725 F. Supp. 285, 294 (N.D. La. 1988) (emphasis added). The problem with which that court was wrestling was the constitutionally and administratively insoluble problem of trying to forge a remedy for vote dilution in judicial elections that will both allow minority voters to have the controlling say in the election of a given percentage of judges and at the same time preserve the independence and special non-legislative attributes of the judiciary and the constitutional rights of both voters and litigants.

Judge Wood argued at length in her Fifth Circuit Reply Brief that no court which has been faced with the problem of devising a remedy for perceived vote dilution in judicial elections has been able to reach a satisfactory melding of the concepts of representatives—who serve the special interests of constituencies and, in order to serve those interests fairly, must be elected on a one-man, one-vote basis—and judges—who by definition, do *not* serve special interests and who, to ensure impartiality and accountability to all, are elected at large from districts as wide as the community they serve. She hereby incorporates by reference the argument and authorities cited to that effect in her Reply Brief.[15]

In the case of representatives, the appropriate remedy for vote dilution simply lies in the creation of sub-districts which pose no new constitutional problems, but which rather enforce the Constitution. In the case of judges, the creation of sub-districts necessarily leads to equal protection, due process, jurisdiction, venue, and administrative problems—not because no legislature or court is clever enough to come up with a remedy, but because the notion of judges as "representatives" inherently contradicts the notion of judges as servants of all the people.

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15. *See, e.g., Mallory v. Eyrich*, 717 F. Supp. 540, 542-45 (S.D. Ohio 1989), *motion to dismiss granted*, 898 F.2d 154 (6th Cir. 1990), *on remand from Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988) (emphasizing the intractability of principles of reapportionment under the fourteenth amendment when applied to judicial elections as well as fundamental considerations of the relationship between the federal courts, state legislature, and state constitution); *Southern Christian Leadership Conference v. Siegelman*, 714 F. Supp. 511, 521 (M.D. Ala. 1989) (seriously questioning "the propriety and wisdom of utilizing the Voting Rights Act to restructure judicial election schemes" and invoking the "real possibility that no f[illegible], reasonable, and equitable remedy can ever be fashioned to redress whatever section 2 violations may exist").

III. JUDGE HIGGINBOTHAM'S CONCURRENCE ELABORATES UPON THE SPECIAL CONSIDERATIONS IN THE ELECTION OF TRIAL JUDGES THAT MAKE THE EQUITABLE AND CONSTITUTIONAL APPLICATION OF § 2 IMPOSSIBLE.

Petitioners fundamentally misconstrue the significance of Judge Higginbotham's concurrence in the *en banc* majority judgment below, which, in fact, focuses on the fundamental problems that arise when the concept of vote dilution is applied to non-representative offices such as the office of trial judge.

Petitioners attack the concurrence principally on the ground that it "wrongly focuses on the post-election function of Texas trial judges rather than the fairness of the electoral process." HLA Brief at 25. The HLA distinguishes three other grounds for attacking the concurrence which are all corollaries to their first objection: (1) that the minority opinion improperly creates *per se* rules immunizing electoral practices from scrutiny under § 2; (2) that "it erroneously treats the state's purported interests in maintaining the present system as a threshold question of § 2 coverage, rather than as only one, relatively minor, aspect of the totality of the circumstances test mandated by Congress"; and (3) that "it imports into the liability inquiry an issue more appropriately addressed at the remedy stage." HLA Brief at 25. All objections boil down to one objection: namely that Petitioners would have this Court ignore the trampling upon constitutional rights and fundamental legal principles that occurs when § 2 vote dilution claims are applied to non-representative offices such as the judiciary—a trampling

which Judge Higginbotham's concurrence describes with devastating clarity in the case of trial judges.

Essentially, the Fifth Circuit's five-judge concurring opinion, authored by Judge Higginbotham, emphasizes the impossibility of devising a constitutional remedy for supposed vote dilution in the narrow field of state district judge elections. Although Judge Higginbotham attributed the lack of remedy for perceived vote dilution in district judge elections to the fact that trial judges are sole decision-makers within their districts, rather than to the fact that trial judges are not "representatives" of their constituencies' special interests, Pet. App. at 92a, the broad conclusion reached by the concurring judges is essentially the same as that reached by the majority: application of the concept of vote dilution to an elected state judiciary is inconsistent with fundamental legal concepts and constitutional requirements since the office of judge is essentially a non-representative office.

As Judge Higginbotham points out, each trial judge is an official who exercises his full authority alone and whose authority has its source in an electorate coterminous with the effective jurisdiction of the court, so that there can be no dilution of votes for that sole decision-making office. Pet. App. at 93a. As Judge Higginbotham also acknowledges, the problem of applying the concept of vote dilution to trial judges does not stop there: "the fact that trial judges act singly is also integral to the linking of jurisdiction and elective base." Pet. App. at 93a. While Petitioners make light of the sole-decision-making characteristic of the office of trial judge stressed by the minority opinion, that is one of the key reasons why the office cannot be considered "representative." It is also a key reason why no remedy can be devised for "vote dilution"

in the election of the office since, as the minority opinion points out,

> Subdistricting would not create an equal opportunity for representation in decision-making, for
>
> > [t]here can be no equal opportunity for representation within an office filed by one person. Whereas, in an election to a multi-member body, a minority class has an opportunity to secure a share of representation equal to that of other classes by electing its members from districts in which it is dominant, there is no such thing as a "share" of a single-member office.

Butts v. City of New York, 779 F.2d 141, 148 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021, 106 S. Ct. 3335 (1986). What subdistricting does, rather than provide minorities with representation in all decisions, is to simply allocate judges, and thus judicial decisions, among various population groups. The Voting Rights Act does not authorize such allocation. It cannot be made to authorize allocating judges by simply restating the office of district judge as a shared office or by asserting that the "function" of an office is not relevant. Saying that district judges in fact share a common office that can be subdistricted does not make it so. Nor does the assertion that function is not relevant make sense. Function is relevant to the threshold question of what features of the state arrangement define the office.

Judge Higginbotham points out numerous important interests involved in the structuring of state judicial election systems that would be profoundly affected by the application of the vote dilution principle and Petitioners' preferred remedy—subdistricting—to single-bench judicial districts. For example, in the

larger Texas counties, although district courts are courts of general jurisdiction, some judges are elected specifically to handle only juvenile or family law or criminal cases. Pet. App. at 101a. This structure, like many others created over the decades to accommodate specialized docket needs, geographical considerations, or other reflections of non-racial functional specificity, would be complicated, if not precluded, by the creation of sub-districts designed solely to fulfill minority voter quotas.

As Judge Higginbotham further argues, to break the linkage between jurisdiction and elective base may well *lessen* minority influence instead of increasing it. Pet. App. at 105a. If there be any validity to Petitioners' claim that in some broad sense elected judges are representative of the voters who elect them, in a world of racially and ethnically structured sub-districts, minority voters would have no influence on the election of most judges and, more likely than not, a minority litigant would be assigned to appear before a judge who was not elected from a district with greater than a 50% minority population. Pet. App. at 105a-107a.

Further, requiring subdistricting to correct for vote dilution

> would change the structure of the government because it would change the nature of the decision-making body and diminish the appearance if not fact of its judicial independence—a core element of a judicial office. Trial judges would still exercise their full authority alone, but that authority would no longer come from the entire electorate within their jurisdictional area. Subdistricting would result in decisions being made for the county as a whole by judges representing only a small fraction of the electorate.

Pet. App. at 108a. Judge Higginbotham concludes that this violence done the system not only would interfere with the state's fundamental right to structure its judiciary without federal interference but it might also retard the goals of the Voting Rights Act itself. Pet. App. at 111a.

The concerns expressed by Judge Higginbotham are not inconsequential considerations lightly arrived at but extremely serious consequences to be reckoned with if the concept of vote dilution under § 2 of the Voting Rights Act is applied to the judiciary in general and to state district judge elections in particular. Respondent Wood and the Fifth Circuit majority would differ from Judge Higginbotham and those judges who concurred with him only by arguing that the violence done to the judiciary by application of § 2 vote dilution principles to those elections stems from an even more radical root than the fact that district judges are sole decision-makers whose authority is coterminous with their electoral base and jurisdiction: it stems from the non-representative nature of the judiciary.

A state judiciary is either elected or appointed, as a state chooses, in order to serve the fundamental state interests of fairness and efficiency in the administration of justice and not at all to serve the special interests of any group of constituents, whether black or white, rich or poor, Jewish or Christian, residents of one neighborhood or residents of another. For that reason it necessarily does radical violence to the concept of an independent state judiciary, as well as to many constitutional and statutory safeguards, to insist that judicial districts be drawn solely to conform to demographic distribution or to insure the proportional representation of minorities in the judiciary (which is ultimately the same thing).

Judges are not representatives of their constituents, and judicial districts should not be structured to insure proportional racial representation.

IV. THE ENFORCEMENT OF § 2(b)'S VOTE DILUTION PROVISIONS IN JUDICIAL ELECTIONS VIOLATES FUNDAMENTAL PRINCIPLES OF FEDERALISM.

One fundamental threshold principle which both the Fifth Circuit and the minority opinion address responds directly to Petitioners' claims that a state's interest in structuring its judiciary should be relegated to "one, relatively minor aspect of the totality of the circumstances test," namely the principle of federalism. Despite Petitioner's claim of triviality, there is an extremely serious question whether the use of the federal courts to force the fundamental restructuring of a state's judiciary violates principles of comity, equity, and federalism set forth in *Younger v. Harris,* 401 U.S. 37, 91 S. Ct. 746 (1971) and *Burford v. Sun Oil,* 319 U.S. 315, 63 S. Ct. 1098 (1943).

As the Fifth Circuit majority wrote:

> It is hard to envision any area lying closer to the core of state concerns than the process by which it selects its own officers and functionaries. Any federal trenching here strikes at federalism's jugular; and such a radical federal trenching as is contended for today should therefore demand a very clear statement indeed.

Pet. App. at 33a. The minority was completely in accord, writing,

> It would run counter to fundamental concepts of federalism:

> As broad as the congressional enforcement power is [under the fifteenth amendment], it is not unlimited. Specifically, . . . the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation.

Oregon v. Mitchell, 400 U.S. 112, 128, 91 S. Ct. 260 (1970).

Since federalism is a fundamental threshold concept, it would obviously violate sound judicial process to relegate this principle to a role as merely *one* minor factor a court may consider in determining whether § 2 has been violated. The principle of federalism actually determines whether the federal courts should enter areas such as the structuring of state judiciaries at all.

V. PETITIONERS' CLAIM THAT § 2 OF THE VOTING RIGHTS ACT MUST BE BROADLY CONSTRUED TO APPLY TO JUDICIAL ELECTIONS BECAUSE § 2 IS COEXTENSIVE WITH § 5 IS ERRONEOUS.

Petitioners make the same fallacious argument for this Court that they made below: (1) this Court has declared that § 5 of the Voting Rights Act requires preclearance of *all* changes in election systems, no matter how minor; (2) this Court has held that § 5 applies to judicial elections; therefore (3) § 2 necessarily applies to judicial elections and turns "*all* action necessary to make a vote effective in *any* primary, special or general election" into actionable discrimination. HLA Brief at 22; *Chisom* Brief at 29-32.

Judge Wood has already rebutted this fallacious argument.[16] Essentially, the fallacies are the following:

Section 5 of the Voting Rights Act requires that certain affected states which historically used discriminatory voting tests or practices seek preclearance from the Justice Department before implementing any "voting qualification or prerequisite to voting, standing, practice or procedure with respect to voting" different from those in effect as of a date supplied by the statute.[17] The Supreme Court has consistently held that § 5 is to be very broadly interpreted to include:

> "Any change affecting voting even though it appears to be minor or indirect, even though it ostensibly expands voting rights, or even though it is designed to remove the elements that caused objection by the Attorney General to a prior submitted change."

NAACP v. Hampton County Elec. Comm'n, 470 U.S. 166, 179, 105 S. Ct. 1128, 1136 (1985) (quoting 28 C.F.R. § 51.11 (1984)); *see also Dougherty County, Ga. Bd. of Educ. v. White*, 439 U.S. 32, 37, 99 S. Ct. 368, 371 (1978) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 566, 89 S. Ct. 817, 832 (1969), that Congress

16. *See* Judge Wood's Fifth Circuit Post-Submission Brief and Supplemental *En Banc* Brief and her Brief in Opposition to LULAC's Petition for a Writ of Certiorari.

17. The State of Texas was originally excluded from those states which must seek preclearance under § 5. It was brought under § 5 by the 1975 amendment of the Act, which newly defined the term "test or device" to include the use of English-only election materials in jurisdictions where a single language minority group comprised more than 5% of the voting age population, and which extended the Act to those jurisdictions which employed such a "test or device" as of November 1, 1972 and had a voter registration or turnout rate of less than 50%. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S. Conc. & Admin. News 177, 186.

in enacting § 5 meant "to reach any state enactment which altered the election law of a covered State in even a minor way"). This Court has clearly held that § 5 preclearance procedures reach changes in election procedure with the *potential* for discrimination, regardless of whether those changes *actually* result in the impairment of the right to vote or were intended to have that effect. *NAACP v. Hampton County*, 470 U.S. at 180-181, 105 S. Ct. at 1136-1137; *see also Allen*, 393 U.S. at 569, 89 S. Ct. at 834.

Petitioners erroneously claim that *this Court* has accorded § 2 the same broad scope as § 5, citing *Allen v. State Bd. of Elections*, 393 U.S. at 566-67 (*see Chisom* Brief at 27) and *South Carolina v. Katzenbach*, 383 U.S. 301, 316 (1965) (*see Chisom* Brief at 28). In fact, however, Chief Justice Warren, writing for the Court, expressly stated,

> We emphasize that only some of the many portions of the [Voting Rights] Act [of 1965] are properly before us. South Carolina has not challenged §§ 2 . . . and other miscellaneous provisions having nothing to do with this lawsuit. Judicial review of these sections must await subsequent litigation.

383 U.S. at 316, 86 S. Ct. at 812. Since, as pointed out above, both *Allen* and the later case of *NAACP v. Hampton County* hold that § 5 can be violated even though a proposed electoral change has *no* discriminatory effect at all, § 2—which by its express terms applies only to electoral schemes which *actually result* in impairment of the right to vote or are intended to have such an effect—cannot be coextensive with the scope of § 5. Thus a close reading of *Allen*, *Hampton County*, and *Katzenbach* to-

gether supports the notion that § 2 could have broad scope—if at all—*only* by analogy to § 5.[18] Any such analogy is, however, expressly *precluded* by the clear language of the official legislative history of the 1982 amendments to the Voting Rights Act, S. Rep. No. 417, 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S. CONG. & ADMIN. NEWS 177.

In its official statement for the record of the intended meaning and operation of the 1982 amendments to the Voting Rights Act, Congress expressly stated that an analogy between §§ 2 and 5 of the Voting Rights Act is "fatally flawed for several reasons." S. Rep. No. 417, 97th Cong. 2d Sess. 2, *reprinted in* 1982 U.S. CONG. & ADMIN. NEWS at 177, 219-220. Congress explained that there is a "fundamental difference" between "the degree of jurisdiction needed to sustain the extraordinary nature of preclearance" required by § 5 and "the use of a particular legal standard to prove discrimination" in the courts, as permitted by § 2. S. Rep. No. 417, 97th Cong. 2d Sess. 2, *reprinted in* U.S. CONG. & ADMIN. NEWS at 220. In its view, § 2 was "*less intrusive* on state functions" than § 5, whose preclearance procedures involve "a broad restraint on all state and local voting practices." *Id.* (quoting testimony of Professor Dorsen) (emphasis added). The most fundamental flaw in the analogy is that it ignores the "terms and operation" of § 2, which confine its application to actual racial discrimination and thus "avoid[s] the problem of potential over-inclusion entirely by its own self-limitation." Sen.

18. *Allen* suggests that § 2 also was intended to reach any state enactment which alters election law in even a minor way. 397 U.S. at 566; 89 S. Ct. at 832. However, this language is dictum in a case which is concerned only with the application of § 5 and which expressly finds that § 5 applies in cases in which § 2 could not apply.

Rep. No. 417 at 43, 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S. CONG. & ADMIN. NEWS at 221. Unlike § 5, which could completely prohibit a widely used prerequisite to voting, like poll taxes, inconvenient polling places or literacy tests, or which could require minority set-asides, § 2 could only invalidate election laws where discrimination had, in fact, been proved. *Id.*

In other words, in its official statement of the meaning and operation of the 1982 amendments to the Voting Rights Act, S. Rep. 97-417, Congress itself stated that the terms of § 2—at least as amended in 1982—and the operation of that provision only within situations of actual racial discrimination are self-limiting factors built into that provision which absolutely distinguish it from § 5. At the same time, Congress expressed its intent and confidence both that § 2 as amended is "less intrusive" than § 5 and that, as amended in 1982, it *cannot* result in "wholesale invalidation of electoral structures." S. Rep. No. 417 at 35, 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S. CONG. & ADMIN. NEWS at 213. The equation of the limited scope of § 2 as amended in 1982 with the broad scope of § 5 and the repudiation by the courts of the very "self-limiting" terms built into the amended section to prevent its use to invalidate whole electoral systems are thus antithetical to the intent of Congress in promulgating the 1982 amendments and to the meaning and purpose of the Act as amended.

In sum, both Supreme Court interpretations of the scope of § 5 and Congress' own official statement of its interest in promulgating the 1982 amendments to the Voting Rights Act compel the conclusion that the scope and function of §§ 5 and 2 of the Voting Rights Act are radically different. Section 5 is prescriptive while § 2 is

remedial and punitive. Section 5 affects *no* extant voting practices or procedures; § 2 is designed to eliminate certain existing discriminatory election practices in specified instances. In one sense the scope and impact of § 5 are much broader than those of § 2, namely in the sense that § 5 applies to *all* voting practices and procedures with the potential for discriminatory results, no matter how minor and no matter of what type; while § 2(b) vote dilution provisions, for example, applies only to elections of representatives from multi-member districts. In another sense, § 2, while it is designed only to correct existing racial discrimination in specific instances, has the potential for a much greater impact on electoral systems, i.e., if it is misapplied to force the wholesale invalidation of electoral systems and the substitution of judicial judgment for the judgment of the citizens as to what their forms of government should be.

The legislative history of the 1982 amendments to the Voting Rights Act makes it clear that Congress never intended the Voting Rights Act to reach and cure all voting inequalities in every electoral system at any cost in terms of the voting rights of the citizenry as a whole or the rights of states to structure their own electoral systems. In particular, Congress was wary of any use of the Act to force the wholesale invalidation and restructuring of state electoral systems by the federal judiciary in the sole interest of maximizing the voting rights of protected minorities. That is why Congress did not extend § 5 of the Voting Rights Act to all jurisdictions, but only to those jurisdictions with a demonstrated history of racial discrimination and low voter registration and turnout. That is also why Congress did not extend § 2(b)

to all electoral practices and systems but only to the election of *representatives* from multi-member districts—elections in which vote dilution can be simply cured by redistricting under the one-man, one-vote principle without destroying the function of the office, invalidating the entire system, or infringing other constitutional rights and guaranties. Finally, that is why Congress included the *proviso* in § 2 which expressly excludes causes of action aimed solely at securing proportional representation of protected minorities in an elected body or which bases its proof on lack of proportional representation—which is precisely the result Appellees seek and which the District Court's opinion mandates.

It is therefore contrary to the meaning and operation of the Voting Rights Act to interpret § 2 and § 5 as jurisdictionally co-extensive and to assign to § 2 the broadest possible scope in order to bring county-wide judicial election systems or any entire judicial election system within its purview. To extend § 2 to judicial elections is not only unwarranted but unnecessary. It ignores not only the protection of § 5 but also the protection of the fourteenth and fifteenth Amendments themselves, which together prevent both potentially discriminatory and intentionally discriminatory judicial election practices.

VI. PETITIONERS' CLAIM THAT THE ATTORNEY GENERAL'S INTERPRETATION OF THE VOTING RIGHTS ACT IS COMPELLING EVIDENCE OF ITS MEANING IS ERRONEOUS.

Finally, Petitioners claim that "interpretation of the Voting Rights Act by the Attorney General is compelling evidence of the Act's meaning." LULAC Brief at 18; HLA Brief at 22; *Chisom* Brief at 33-36. They then cite

to the Attorney General's consistent application of *§ 5* preclearance procedures to the judiciary and to Assistant Attorney General John Dunne's refusal last October, 1990 to preclear the creation of new Texas district court benches on the ground that he personally disagreed with the *en banc* decision of the Fifth Circuit on this *§ 2* case below.

The three-judge panel which decided *MABA* this past December 26, 1990[19] put it best:

> We close by expressing our concern at the actions taken, and the position expressed, by the Attorney General and DOJ in this matter. Texas is within the geographical jurisdiction of the Fifth Circuit. On September 28, 1990, in LULAC, that court, sitting *en banc*, declared, by a margin of 12-1, that section 2 does not apply to at-large, numbered-post, multi-member elections of district judges in Texas. By a margin of 7-6, the court declared that the election of judges, in general, is not within the ambit of section 2.
>
> Despite this plain ruling, the Attorney General, in his letter of November 5, interposed an objection to S.B. 1379 solely on the basis of his contention that "use of the at-large election system [sic] with numbered posts and majority vote results in a clear violation of section 2. . . ." During oral argument in the instant matter, the DOJ has asserted that it does not consider itself bound by the LULAC decision, even as to electoral changes in the three states encompassing the Fifth Circuit.
>
> This position reflects a disturbing disregard for the rule of law. . . .
>
> . . .

19. *See supra* at 13a-14a.

> The orderly administration and enforcement of the Voting Rights Act must be based upon the rule of law, as enacted by Congress and interpreted by the courts. In our dark past, minority rights were abrogated by defiant state officials who refused to accept the rule of law, as declared by the federal courts. That era, fortunately, has passed. We merely observe that the commendable objectives of the Voting Rights Act can be achieved, as well, only through adherence to the orderly, albeit sometimes time-consuming, process of court interpretation, to which the United States, like the states and private parties, is subject.

Wood Supp. App. at 6a-7a. As the three-judge panel stated, the United States is an interested participant in this litigation; it is therefore subject to the rule of law like any other litigant.

VII. PROTECTED CLASSES ARE NOT ENTITLED TO PROPORTIONAL REPRESENTATION IN THE STATE JUDICIARY.

The central issue in this case—the one issue underlying all the preceding issues—is whether § 2(b) of the Voting Rights Act requires states to set aside separate and perhaps even demographically unequal mini-judicial districts in which black voters can ensure the election of black judges who will represent the interests of their constituents in dispensing justice. Petitioners argue that under the system they envision black judges would be accountable to black voters while other judges would be accountable to non-black voters[20] and that a separate but equal

20. This is the problem which so troubled Judge Higginbotham. *See supra* at 32. It is still a problem under the remedial schemes such as cumulative voting which are designed to give minority voters special influence in judicial elections and which Petitioners now suggest might provide an alternative to the minority/minority subdistricting implied as a remedy by *Gingles* and urged by Petitioners below.

black judiciary serving the black community is essential to combat racism and discrimination in the election of black judges. Respondents argue that a separate but equal black judicial system encourages racism and divisiveness; and they would point out to the Court that absolutely no racism or discrimination was proved below. Indeed, the exact opposite was proved: there is *no difference* in the percentage of all votes or black votes received by Democratic candidates: black candidates share the fate of all Democrats whatever their color, subject only to the vagaries of politics. All the Petitioners proved below (even excluding the proven cause of the defeat of black candidates, namely partisan—not racial—voting), was that the percentage of black district judges in the Texas state judiciary falls short of the percentage of blacks in the total population of Texas. They overlook the facts, also proved below, that (using Harris County, Texas as an example) black-supported Democrats constitute 58% of the judges in Harris County;[21] that black judges constitute 5.1% of the state district judges in the county but attorneys constitutionally qualified to run for state district judge[22] are only 3.5% of the total qualified bar;[23] that

21. That fact alone would prove that the white majority does *not* vote sufficiently as a bloc to enable it usually to defeat the preferred candidate of the minority if, as Justice Brennan's minority opinion *Gingles* holds, that preferred candidate need not be minority. 478 U.S. at 68.

22. The Texas Constitution requires that district judges be citizens of the United States, have been practicing lawyers or judges in the State for the four years preceding the election, have resided in the judicial electoral district for two years, and reside in the district during his four year term. Tex. Const. of 1876, art. 7, Wood App. at 1a.

23. Judge Wood contended below that under the legal principle adopted by this Court in analogous Title VII cases, the relevant standard for measuring minority electoral success for an office open

blacks have won all Democratic primary races in which they have run for state judge since 1984; that black candidates have won 32% of all races for district judge in which they have run since 1978, including 18% of all contested races; and that if the black candidate had been elected every single time he or she ran for office (i.e., 22 out of approximately 180 Harris County races since 1978), the percentage of blacks in the Harris County judiciary would still not approach the 18.1% entitlement to district judges benches which Petitioners claim.[24]

The Court should not be misled: Petitioners have not proved *any* racial discrimination in this case as that term is ordinarily understood. At most, they have shown that the percentage of state district judges in Texas falls short of representation proportional to the percentage of blacks in the total Texas population. The shortfall from proportional representation is undisputed. It is also expressly excluded as sufficient or controlling ground for a voter discrimination suit under the terms of § 2 itself, which states as amended:

> The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided, That nothing in this section establishes a right to have members of a protected class*

to only a small percentage of the electorate is the percentage of eligible candidates, not voters. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115 (1989) and *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706 (1989).

24. This fact would remain true even if the eleven races which were run and lost repeatedly by the same four black candidates in Harris County had been run by different people capable of holding office simultaneously.

elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973, reprinted in HLA Brief at 3 (emphasis added).

Thus, even if Petitioners were right on *all* of the other issues before this Court—that judges are "representatives" of their constituents; that fundamental constitutional rights and legal principles would not be affected by the application of the concept of vote dilution to the judiciary or are irrelevant when the enforcement of minority rights is at stake; that § 5 preclearance standards are coextensive with and determinative of impermissible racial discrimination under § 2—and Petitioners are not right on *any* of them—Petitioners would still be seeking by this suit to bring about the very state of affairs precluded by the statute under which they have sued—proportional representation—and they would measure their grievance strictly by this very shortfall from proportionality. To deny that they have such a cause of action is not racist discrimination. It is the recognition that equitable and constitutionally sound judicial election structures are characterized neither by proportionality nor by the representation of interest groups but by their ability to dispense fair and equal justice to all under a system in which each judge is equally accountable to every voter.

CONCLUSION

Therefore, for the foregoing reasons, Respondent Harris County District Judge Sharolyn Wood requests that the Court affirm the *en banc* decision of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

(To be reported at: 755 F.Supp. 735)

(Publication page references are not available for this document.)

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS (MABA) (Statewide), et al.,
Plaintiffs,

v.

The STATE OF TEXAS,
Defendant,

and

Faith Johnson, et al.,
Defendant-Intervenors.

UNITED STATES of America,
Plaintiff,

v.

STATE OF TEXAS, et al.,
Defendants.

Nos. MO-90-CA-171, A-90-CA-1018.

United States District Court,
W.D. Texas,
Midland-Odessa Division.

Dec. 26, 1990.

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David R. Richards, Austin, Tex.

Before JERRY E. SMITH, Circuit Judge, LUCIUS D. BUNTON, III, Chief District Judge, and WALTER S. SMITH, Jr., District Judge.

MEMORANDUM OPINION AND ORDER

In this consolidated case we sit as a special three-judge court pursuant to section 5 of the Voting Rights Act of 1965 (the "Act"), 42 U.S.C. § 1973c. The private plaintiffs in one action (No. MO-90-CA-171) and the United States in the other (No. A-90-CA-1018) ask us to enjoin the implementation, or continuing implementation, of certain alleged voting changes affecting the selection of state district judges in several designated counties in Texas. We conclude that as a matter of law the plaintiffs are entitled to no relief.

I.

For the sake of simplicity, we consider the challenged judgeships in two groups: (1) the Travis County judge-

ships and (2) the judgeships in what we will term the "other challenged counties," which include the Texas counties of Dallas, Lubbock, Tarrant, and Victoria. Our basis for denying relief differs between the two groups, as their legal status is dissimilar. As to both groups, the plaintiffs challenge the continuing implementation of county-wide voting for multiple state district judge positions within each of the subject counties. They assert that the at-large election of state district judges is in violation of section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

The United States Court of Appeals for the Fifth Circuit recently has held that section 2 does not apply to the election of judges. See *League of United Latin American Citizens Council No. 4434 v. Clements,* 914 F.2d 620, 622 (5th Cir. 1990) (en banc) (overruling *Chisom v. Edwards,* 839 F.2d 1056 (5th Cir.), *cert. denied,* 488 U.S. 955, 109 S. Ct. 390, 102 L.Ed.2d 379 (1988)), *petition for cert. filed sub nom. Houston Lawyers' Ass'n v. Mattox,* 59 U.S.L.W. 3406, ____U.S.____, ____S. Ct.____, ____L.Ed.2d____ (U.S. Nov. 21, 1990) (No. 90-813). Based at least in part, if not entirely, upon its view that it is not bound by that decision (hereinafter *"LULAC"*), the Attorney General of the United States on November 5, 1990, interposed an objection to the implementation of new district judgeships in the other challenged counties. The objection was interposed pursuant to the Attorney General's conclusion that the State of Texas had not carried its burden, under section 5, of showing that the new judgeships would not violate section 2.

A few days earlier, on October 26, 1990, the private plaintiffs had filed the instant complaint in No. MO-90-

CA-171. They assert that the new judgeships in the other challenged counties may not be implemented because, *inter alia*, they have not been precleared, allegedly as required by section 5, either the Attorney General or the United States District Court for the District of Columbia.

Additionally, the private plaintiffs assert that two district judgeships in Travis County have not received preclearance as required. The private plaintiffs seek an injunction proscribing all further elections in Travis County and the other challenged counties until preclearance is obtained.

Following the Attorney General's interposition of an objection as to the other challenged counties on November 5, the United States filed the instant complaint in No. A-90-CA-1018, seeking to enjoin the implementation of the asserted voting changes in the other challenged counties. The United States and the Attorney General now contend, as well, that the Travis County judgeships were subject to preclearance requirements, were not precleared, and now should be submitted for preclearance.

II.

We conclude that creation of the Travis County judgeships at issue here is not subject to the preclearance requirement of section 5. The judgeships in question are the 200th and 201st judicial district court, which were added to Travis County by S.B. 515, which bill was signed by the governor on June 1, 1971, and became effective on August 20, 1971. The bill created the 200th judicial district court effective September 1, 1971, and the 201st effective January 1, 1973.

Section 5 was not applicable to Texas at that time, but the state became a covered jurisdiction on August 6, 1975, by operation of Pub. Law No. 94-73, the 1975 amendments to the Act. Section 204 of the enactment, 89 Stat. 402, added language to section 5 to require preclearance as to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972".

[1] Thus, in order to be a covered change, an electoral change in Texas must be different from one in "force or effect" as of November 1, 1972. S.B. 515 was in effect long before that **date** and has remained unchanged thereafter. The effective **date** of the law, not the **dates** on which the respective judgeships were first filled through appointment or election, are determinative for purposes of section 5.

At least one three-judge voting rights court in Texas has so held. In *Hereford Indep. School Dist. v. Bell,* 454 F.Supp. 143, 145 (N.D. Tex. 1978) (three-judge court), the court explained that preclearance was required for election procedures "enacted after November 1, 1972." [Emphasis added.] The same conclusion was suggested by the Supreme Court in *Briscoe v. Bell,* 432 U.S. 404, 413 n. 12, 97 S. Ct. 2428, 2433 n. 12, 53 L.Ed.2d 439 (1977), which noted that as to Texas, the 1975 amendments established November 1, 1972, as "the precise **date** at which a coverage determination becomes effective, thereby requiring, for example, preclearance of any laws affecting voting rights after that **date**." [Emphasis added.]

The applicable test was enunciated in *City of Lockhart v. United States,* 460 U.S. 125, 103 S. Ct. 998, 74 L.Ed.

2d 863 (1983). The Court observed that in ascertaining whether a change has a proscribed effect, "[t]he proper comparison is between the new system and the system actually in effect on November 1, 1972. . . ." *Id.* at 132, 103 S. Ct. at 1003. Quoting *Perkins v. Matthews,* 400 U.S. 379, 394, 91 S. Ct. 431, 439, 27 L.Ed.2d 476 (1971), the *Lockhart* court noted that " '§ 5's reference to the procedure "in force or effect on November 1, 19[72]," must be taken to mean the procedure that would have been followed if the election had been held on that **date**.' "

Here, the "system actually in effect on November 1, 1972," included the existing 200th and 201st district courts. A judge had been gubernatorily appointed to the 200th court in August 1971, and primary elections were conducted in the spring of 1972. Although the general election was held within a few days after November 1, 1972, absentee balloting was well underway by that date. A judge was gubernatorily appointed to the 201st court in January 1973. The primary and general elections were conducted, respectively, in the spring and fall of 1974.

Under the reasoning in *Perkins,* if a hypothetical election had been conducted for the 200th and 201st courts on November 1, 1972, it would have been conducted under the system in place prior to that **date**, which included the existing two courts in question. Thus, we conclude that the **date** of enactment, rather than the **dates** of the first elections for the respective two courts, is the appropriate **date** by which to determine applicability of section 5.

We also observe that looking to the **date** of enactment is consistent with the posture taken by the Attorney General concerning the questioned judgeships in the other challenged counties. In his letter of November 5, 1990, the Attorney General interposed objection to the changes effected by the enactment of the bill creating those courts. The Attorney General cannot have it both ways: If enactment is the operative event for purposes of the judgeships in the other challenged counties, the same must be true for the Travis County judgeships, as well. Hence, we deny all relief as to the Travis County judgeships.

III.

We conclude that creation of the questioned judgeships in the other challenged counties was precleared by operation of law, assuming arguendo that the creation of new judgeships such as those at issue is subject to section 5's preclearance requirement. The judgeships being challenged herein in the other challenged counties were created by S.B. 1379, which was signed by the governor on June 14, 1989, and established the judgeships effective September 1, 1989. The bill created fifteen judgeships, which are set forth in the margin.[1]

1.

Court	County(ies)	Challenged
363rd	Dallas	Yes
364th	Lubbock	Yes
365th	Dimmitt, Maverick, Zavala	No
366th	Collin	No
367th	Denton	No
368th	Williamson	No
369th	Anderson, Cherokee	No
370th	Hidalgo	No
371st	Tarrant	Yes
372nd	Tarrant	Yes
373rd	Tarrant	No
374th	Tarrant	No
375th	Tarrant	No
376th	Tarrant	No
377th	Victoria	Yes

Section 5 permits a covered jurisdiction, such as Texas, to seek preclearance of electoral changes either by filing a declaratory judgment action in the United States District Court for the District of Columbia or by submitting the changes to the Attorney General. By the specific terms of section 5, a submitted change is deemed precleared as a matter of law if "the Attorney General has not interposed an objection within sixty days after such submission."

The Attorney General has promulgated regulations designed to implement the preclearance contemplated by section 5. See 28 C.F.R. ch. 1 pt. 51, "Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended." The regulations reiterate the provision in section 5 that a matter is deemed precleared if not objected to by the Attorney General within sixty days. 28 C.F.R. § 51.1(a)(2) (1990).

During the sixty-day period, the Attorney General may, by letter, request "any omitted information considered necessary for the evaluation of the submission." *Id.* § 51.37(a). Significantly, "[w]hen a submitting authority provides documents and written information materially supplementing a submission . . . , the 60-day period . . . will be calculated from, the receipt of the supplementary information. . . ." *Id.* § 51.39(a) (emphasis added).

[2] The State of Texas asserts that S.B. 1379 was precleared by operation of law in that sixty days had elapsed from its initial submission without either (1) the interposition of an objection or (2) the submission of "materially supplementing" information. We agree and, hence, deny all relief as to the judgeships in the other challenged counties.

For purposes of the present request under § 5 for injunctive relief, only those judgeships marked "Yes" under the "Challenged" column are being questioned by the plaintiffs. The 373rd, 374th, 375th, and 376th courts do not exist, although nominally authorized by S.B. 1379, as the statutory conditions necessary to bring them into existence have not been met.

The state submitted S.B. 1379 to the Attorney General on February 13, 1990; the sixtieth day for interposing an objection was April 16, 1990. During the period between February 13 and April 16, the state provided no additional material, with one exception.

On March 23, following a telephone conversation with an employee of the United States Department of Justice (DOJ), the state telecopied a copy of Tex. Const. art. V, §§ 7 and 7a, to the Voting Rights Section of the Civil Rights Division of the DOJ. Each of those constitutional sections had been precleared by the Attorney General by letter dated October 1, 1985.

By letter dated April 11, the Attorney General's office notified the state that supplemental information had been received and that, consequently, the deadline for objection had been extended to May 22. The letter did not assert that the additional information constituted a material supplement.

Between March 23 and May 22, the state furnished no additional material, with one exception. By letter dated May 16, referencing a telephone conversation with a DOJ employee, the state, by letter to that employee, requested that she consider, in regard to the submission of S.B. 1379, the panel opinion in *LULAC*, 902 F.2d 283 (5th Cir. 1990) (declaring section 2 inapplicable to multi-member, county-wide judgeships), and the then-anticipated en banc opinion (which in fact was issued the following September).

By letter dated May 18, the Attorney General's office notified the state that by virtue of the state's May 16 letter, the deadline for objection had been extended to July 16 (the sixtieth day after May 16). Then, following the en banc oral arguments in *LULAC* that occurred on June 19, 1990, the state, by letter dated July 2, 1990, purported to withdraw its submission of S.B. 1379. Immediately following issuance of the en banc opinion in *LULAC* on September 28, 1990, the state on October 2 resubmitted S.B. 1379 to the Attorney General, requesting preclearance.

We hold that neither the telecopy of March 23, 1990, nor the letter of May 16, 1990, constitutes a material supplemental submission necessary to extend the sixty-day persiod provided to the Attorney General for interposing an objection. If the March 23 telecopy thus did not start the sixty-day period running anew, S.B. 1379 was precleared by operation of law on April 16, 1990. Assuming arguendo that the March 23 telecopy was a material supplemental submission, the sixty-day period nevertheless expired on May 22, as the letter of May 16 was not a material supplemental submission.

[3] The assertion that the telecopying of two sections from the Texas constitution started the sixty-day period running anew is entirely without merit. Those constitutional sections were available as published legal materials in any reasonably complete law library; the DOJ does not argue that it had no easy access to the same. Moreover, the sections had been precleared by the Attorney General several years previously. They were not at issue, directly or indirectly, in the submission of S.B. 1379.

Facts are "material" if they "might affect the outcome . . . under the governing law." *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). There is no respect in which the submission to the Attorney General of a copy of readily available provisions, of which the Attorney General was well aware and which already had received the close scrutiny of the preclearance process, possibly could have "affected the outcome" of the submission of S.B. 1379.

Additionally, section 51.39(a) of the regulations, discussed *supra*, requires that in order to re-start the sixty-day period, the new documents must be "materially supplementing" the initial submission. Even assuming arguendo that the documents here were "material," they cannot reasonably be deemed to have "supplemented" the submission of S.B. 1379. As we have observed, the Attorney General already knew of the constitutional sections, had ready access to them, and had precleared them. The mere sending of copies of them to the DOJ did not add to, or supplement, anything.

Finally, section 51.37(a) of the regulations, discussed *supra*, requires that any additional information needed by the Attorney General must be requested "by letter." It is acknowledged that the sections of the Texas constitution, if requested at all, were asked for by telephone. In summary, then, the March 23 telecopy did not trigger a new sixty-day period, and S.B. 1379 was precleared by operation of law on April 16.

[4] Assuming arguendo that a new sixty-day period began running on March 23, it expired on May 22, and the state's letter of May 16 cannot be deemed a "materially supplementing" submission. The May 16 letter merely called the DOJ's attention to the pendency of the

LULAC case. But that information did not "supplement" anything.

As of May 16, the DOJ was participating actively as amicus curiae in *LULAC*, in which oral argument was presented before the Fifth Circuit panel on April 30, within a panel opinion issued on May 11. See *LULAC*, 902 F.2d 293 (5th Cir. 1990). On May 16, the court entered its order granting rehearing en banc in *LULAC*. *See LULAC*, 902 F.2d 322, 323 (5th Cir. 1990). The DOJ participated in briefing and oral argument before the en banc court.

Thus, the DOJ was aware of, and was a part of, every phase of the *LULAC* litigation during the time when S.B. 1379 was under submission. The DOJ was undeniably cognizant of the fact that both *LULAC* and S.B. 1379 involved the question of at-large voting for district judges in Texas. A letter asking the DOJ to consider *LULAC* in reviewing S.B. 1379 thus certainly was not "material" and could not have "supplemented" any information or knowledge that the DOJ or the Attorney General already had.

Accordingly, the mere sending of the May 16 letter did not trigger a new sixty-day period under section 51.39(a). The sixty-day period, even if started anew on March 23, expired on May 22, and consequently, in the alternative, was precleared by operation of law on May 22. The purported withdrawal of the submission on July 2 had no legal effect, as by operation of law the preclearance had already occurred, and the state was free to implement the electoral changes, if any, encompassed by S.B. 1379.

Finally, as to the letter of May 16, we note that the Attorney General apparently never deemed the *LULAC* litigation material, in any event, for purposes of the preclearance of S.B. 1379. That is evident from the fact that, despite the Fifth Circuit's en banc conclusion that section 2 does not apply to the election of judges, the Attorney General, in his letter of November 5 interposing an objection to S.B. 1379, acknowledged the *LULAC* en banc opinion but declined to follow it. Instead, the November 5 letter declares that "use of the at-large election sytem [sic] with numbered posts and majority vote results in a clear violation of Section 2. . . ."

Hence, for this additional reason, the *LULAC* litigation, from the Attorney General's point of view, was not a "material" or "supplemental" submission that, under section 51.39(a), could have triggered a new sixty-day period for the interposition of objections. Therefore, S.B. 1379 has been precleared by operation of law, and thus the prerequisites for an injunction under section 5 have not been satisfied.

IV.

We close by expressing our concern at the actions taken, and the position expressed, by the Attorney General and DOJ in this matter. Texas is within the geographical jurisdiction of the Fifth Circuit. On September 28, 1990, in *LULAC*, that court, sitting en banc, declared, by a margin of 12-1, that section 2 does not apply to at-large, numbered-post, multi-member elections of district judges in Texas. By a margin of 7-6, the court declared that the election of judges, in general, is not within the ambit of section 2.

Despite this plain ruling, the Attorney General, in his letter of November 5, interposed an objection to S.B. 1379 solely on the basis of his contention that "use of the at-large election sytem [sic] with numbered posts and majority vote results in a clear violation of Section 2. . . ." During oral argument in the instant matter, the DOJ has asserted that it does not consider itself bound by the *LULAC* decision, even as to electoral changes in the three states encompassing the Fifth Circuit.

This position reflects a disturbing disregard for the rule of law. The Attorney General is not merely preserving, as an advocate, an issue for possible later resolution by the Supreme Court. Instead, he has taken official action, by interposing an administrative objection, that is based solely upon a ground definitively rejected as the law in the Fifth Circuit. The DOJ participated actively in the *LULAC* litigation and now, having lost, seeks to assert its view by ignoring the law of the circuit.

The aim of the United States here is salutary—to effect the laudable goals of the Act by opposing changes that, in the view of the Attorney General, have the purpose or effect of diminishing the role of minorities in the electoral process. However, as the instant action is brought under the Act, both this court and the Attorney General are limited to the role assigned by Congress in passing the Act.

[5] [6] The circuit court by which this district court is bound (absent Supreme Court directive) has declared that section 2 does not apply to the election of judges. The United States, as a litigant in this court, is bound by that determination. Likewise, it may not wield its administrative sword in this circuit in contravention of

the interpretation of the Act enunciated by the Fifth Circuit (again, absent any intervening declarations by the Supreme Court).[2]

The orderly administration and enforcement of the Voting Rights Act must be based upon the rule of law, as enacted by Congress and interpreted by the courts. In our dark past, minority rights were abrogated by defiant state officials who refused to accept the rule of law, as declared by the federal courts. That era, fortunately, has passed. We merely observe that the commendable objectives of the Voting Rights Act can be achieved, as well, only through adherence to the orderly, albeit sometimes time-consuming, process of court interpretation, to which the United States, like the states and private parties, is subject.

V.

In summary, no preclearance was required for S.B. 515, and S.B. 1379 was precleared by operation of law. Hence, the requirements for injunctive relief under section 5 have not been met.[3] We deny all relief. It is so ordered.

JERRY E. SMITH, Circuit Judge, and WALTER S. SMITH, Jr., District Judge, concur.

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2. We also observe that the result of the Attorney General's position here, if allowed to prevail, is somewhat mixed. One of the challenged judgeships involves a black female elected in 1990 in Dallas County; another challenge, in Tarrant County, would bring about the removal from the bench of an Hispanic male who has served as a state judge for many years.

3. See also Hunter v. City of Monroe, Civ. Ac. No. 90-2031 (W.D. La. Nov. 7, 1990) (three-judge court) (holding that § 5 does not apply to the mere addition of judgeships to an existing judicial structure).

LUCIUS D. BUNTON, Chief District Judge, concurring in part and dissenting in part.

I concur in the part of the majority's opinion that finds the Travis County judgeships, i.e., the 200th and 201st District Courts are not subject to the preclearance requirements of Section 5. I dissent from the part of the opinion that the questioned judgeships in the other challenged counties were precleared by operation of law. This is incorrect, because it is contrary to the facts that were presented to the Court and, further, is incorrect under the law for the reasons hereinafter set forth.

This is an action pursuant to the Voting Rights Act of 1965, 42 U.S.C. 1973c as amended in 1982, 42 U.S.C. Sections 1983 and 1988, and the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States, challenging the failure of the State of Texas to preclear, pursuant to the Voting Rights Act, the creation of seven State District Judgeships in Texas.[4] This hearing is limited to consideration of the Voting Rights issue.

Section 5 of the Voting Rights Act provides that whenever a political subdivision seeks to "administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972", it must obtain preclearance either from a United States

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363rd	Dallas
364th	Lubbock
371st	Tarrant
372nd	Tarrant
377th	Victoria
200th	Travis
201st	Travis

District Court in the District of Columbia or the Attorney General. If preclearance is sought from the Attorney General and he tenders no objection within sixty days, the submission is precleared by operation of law.[5] However, if the submitting authority provides "supplementary information" for evaluation, the sixty day period is recalculated from receipt of the supplementary information.[6] Texas, as a covered jurisdiction under this section,[7] must seek preclearance of electoral changes in accordance with the section's provisions.

Five of the seven challenged judgeships were created by S.B. 1379,[8] which was passed by the Texas legislature in its 1989 regular session and signed by the Governor on June 14, 1989. Texas submitted S.B. 1379 to the Attorney General for preclearance on February 13, 1990. The Attorney General's deadline for interposing an objection was April 16, 1990. On March 20th, Texas telecopied two sections of the Texas Constitution (Sections 7 and 7a of Article 5) to the Voting Rights Section of the Civil Rights Division of the Department of Justice ("DOJ") following a telephone conversation with a DOJ employee. Upon receipt of this supplementary information, the Attorney General extended the objection deadline to May 22, 1990

5. See 42 U.S.C. § 1973c.

6. 28 C.F.R. § 51.39(a) (1990).

7. See 28 C.F.R. Pt. 51, Appendix (1990) (Texas has been a "covered jurisdiction" since September 23, 1975).

8. The 200th and 201st District Courts in Travis County were added by S.B. No. 515, which was signed by the Governor on June 1, 1971, and became effective August 30, 1971. Section 1 of the bill created the 200th judicial district effective September 1, 1971, and the 201st effective January 1, 1973.

On May 16, 1990, Texas submitted a letter to the Attorney General requesting that its submission be considered in accordance with the Fifth Circuit's panel decision and anticipated en banc decision in *LULAC Council No. 4434 v. Clements*. Thus, the Attorney General extended the objection deadline to July 16, 1990.

After en banc arguments in *LULAC*, Texas withdrew its submission of S.B. 1379 in a letter dated July 2, 1990. Following the en banc decision in *LULAC*, Texas resubmitted S.B. 1379 on October 1, 1990.

On November 5, 1990, the Attorney General interposed its objection to Texas' voting changes promulgated by S.B. 1379, noting that Texas failed to meet its burden of establishing that the submitted changes have neither a discriminatory purpose nor a discriminatory effect.

This Court must determine three main issues: Is Section 5 of the Voting Rights Act applicable to the contested judgeships? If so, did Texas properly obtain preclearance? Finally, if a violaton of Section 5 does exist, what is the appropriate remedy?[9]

Does Section 5 Apply to S.B. 1379?

Yes.

Since September 23, 1975, Texas has been a "covered jurisdiction" under Section 5 of the Voting Rights Act.[10]

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9. See McCain v. LyBrand, 465 U.S. 236, 250, n. 17, 104 S. Ct. 1037, 1046, n. 17, 79 L.Ed.2d 271, 282, n. 17 (1984) ("The only questions in an action alleging a violation of the § 5 preclearance requirement are (1) whether a change is covered by § 5, (2) if the change is covered, whether § 5's approval requirements have been satisfied, and (3) if the requirements have not been satisfied, what relief is appropriate."); Lockhart v. United States, 460 U.S. 125, 129, n. 3, 103 S. Ct. 998, 1001, n. 3, 74 L.Ed.2d 863 (1983).

10. 28 C.F.R. Pt. 51, Appendix (1990).

The Act requires preclearance when a State seeks to administer any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . .".[11] Notably, this section applies itself to all "voting", and imposes no limitation on who or what is the subject of the voting. In fact, the Supreme Court summarily affirmed two cases which found that judicial elections are submit to the requirements of Section 5.[12] Although Texas argues "that Section 5 does not apply to the changes that are the subject of the plaintiffs' challenge because judicial elections in general are not covered by Section 5",[13] it goes on to add, "Texas understands that this Court is bound by the Supreme Court's summary affirmances in two cases in which these legal arguments were rejected."[14] Thus, Texas does not dispute the applicability of Section 5 in this instance; it merely argues S.B. 1379 has met the preclearance requirements contained in the section.

Did Texas properly obtain preclearance of S.B. 1379 pursuant to Section 5?

No.

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11. See 42 U.S.C. § 1973(c).

12. Brooks v. State Board of Elections, No. CV 288-146, 1988 WL 180759 (S.D. Ga. Dec. 1, 1989), modified (May 29 and June 25, 1990), aff'd mems., ____U.S.____, 111 S. Ct. 288, 112 L.Ed.2d 243, ____U.S.____, 111 S. Ct. 228, 112 L.Ed.2d 243 (1990); Haith v. Martin, 618 F.Supp. 410 (E.D.N.C. 1985), aff'd mem., 477 U.S. 901, 106 S. Ct. 3268, 91 L.Ed.2d 559 (1986) ("We hold the fact that an election law deals with the election of members of the judiciary does not remove it from the ambit of section 5.")

13. Texas's Response to Plaintiffs' Motion to Enjoin Elections for Certain Unprecleared Judgeships, p. 13.

14. Id.

Under Section 5, Texas could pursue either of two options in obtaining preclearance of voting changes: Submit its preclearance request to a District Court in the District of Columbia, or submit them to the Attorney General. Texas opted for the latter, and submitted S.B. 1379 for preclearance February 13, 1990. Accordingly, the Attorney General had sixty days, or until April 16, 1990, to interpose an objection.

Within this period (on March 20th), Texas telecopied two sections of the Texas Constitution (Sections 7 and 7a of Article 5) to the Voting Rights Section of the Civil Rights Division of the Department of Justice. According to 28 C.F.R. § 51.39, submission of "supplementary information" extends the deadline. Thus, the new deadline became May 22, 1990.[15]

Within this new period (on May 16th), Texas submitted supplementary information to the Attorney General in the form of a letter requesting that its preclearance request be considered in accordance with *LULAC*.[16] This resulted in extension of the objection deadline to July 16, 1990.[17]

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15. On April 16, 1990, Texas received the Attorney General's letter notifying Texas that "supplemental information was received on March 23 and 28, 1990." Thus, the deadline was extended to May 22, 1990.

16. On April 16, 1990, Texas received notification from the Attorney General that Texas' submission of supplemental information extended the objection deadline. Thus, when Texas chose to submit its second letter, it was fully aware that submission of supplemental maerials would result in an extension of the existing deadline. Even so, Texas chose to submit the letter.

17. In a letter dated May 18, 1990, the Attorney General notified Texas of the new July 16, 1990 deadline, stating "[w]e received additional supplemental information regarding this submission on May 15 and 16, 1990."

Prior to the July 16th deadline, Texas withdrew its submission of S.B. 1379 in a letter dated July 2, 1990. To explain this action, Texas states, "[p]rior to this withdrawal, the 60th day for your response to this submission was July 16, 1990." Texas offers as its reason for withdrawal that "[i]t is thus not certain whether the court will issue its opinion (in *LULAC*) prior to July 16, 1990." Additionally, since a jurisdiction is only permitted to withdraw a submission prior to a final decision by the Attorney General,[18] Texas' actions in requesting and accepting withdrawal affirms its understanding that preclearance had not yet been achieved. Thus, Texas clearly acknowledges both that its preclearance request has not been decided by the Attorney General, and that its submission of "supplementary materials" extended the objection deadline to July 16, 1990. With this, Texas' first attempt at preclearance ended without a decision by the Attorney General.

On October 1, 1990, Texas sent a letter to the Attorney General resubmitting[19] its application for preclearance of S.B. 1379. The language in the letter very clearly states this is a resubmission of Texas' preclearance request, thus beginning another sixty day objection deadline.[20]

On November 5, 1990, which was well within the time frame for submission of objections, the Attorney General

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18. 28 C.F.R. § 51.25(a) (1990).

19. The specific wording in the letter is "This letter is to advise you that the State of Texas is hereby resubmitting its submission of Chapter 632, Senate Bill 1379, 71st Legislature, 1989." The Court sees no ambiguity in the language which would cause Texas to believe it was doing anything other than resubmitting its preclearance request, thus beginning another sixty day objecting period.

20. See 28 C.F.R. § 51.39 (1990).

issued its opinion denying preclearance of S.B. 1379. Texas made no further attempts to obtain preclearance. Accordingly, it is clear that S.B. 1379 simply has not been precleared pursuant to Section 5 of the Voting Rights Act.

What Remedy is Appropriate to Achieve Section 5 Compliance for S.B. 1379?

Preclearance.

To achieve compliance with Section 5, Texas must obtain preclearance of S.B. 1379. "By the very terms of the statute, covered changes in election laws may not be put into effect until they have either been precleared by the Attorney General or approved by the United States District Court for the District of Columbia. Indeed, they are not 'effective as laws until and unless [they are] cleared pursuant to § 5.'"[21] Since the Attorney General refuses preclearance, the only remaining option lies with the United States District Court for the District of Columbia. In my opinion, since Section 5 compliance is lacking, Texas must "institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. . . ."[22] In the interests of justice, preclearance must be sought within sixty days.

This leaves open the status of the unprecleared judgeships during the pendency of this process. The United

21. Haith, supra note 7, at 414.

22. See 42 U.S.C. § 1973c.

States Supreme Court considered this situation in *Berry v. Doles*, 438 U.S. 190, 98 S. Ct. 2692, 57 L.Ed.2d 693 (1978). In that case, the three-judge panel found non-compliance with Section 5, enjoined further enforcement of the relevant statute, and ordered the State of Georgia to seek approval under Section 5 within thirty days. *Id.* at 192, 193, 98 S. Ct. at 2693, 2694. The Court stated, "If approval is obtained, the matter will be at an end." *Id.* at 193, 98 S. Ct. at 2694. I agree that in the interim of the preclearance process, the judges presiding in the 363rd, 364th, and 377th District Courts should continue in the operation of their courts, with full power and authority.[23] Since the newly elected judges to the 371st and 372nd District Courts have not yet taken the oath and initiated proceedings in those Courts, the unprecleared judgeships in Districts 371 and 372 should remain vacant until preclearance is obtained. No affirmative action to certify unprecleared judgeships is appropriate.

In rendering this opinion, I note that I in no way wish to hinder the Legislature's efforts to create additional State District Courts. In fact, I recognize the imperative need for the judgeships created by S.B. 1379. I merely ask, as I must under the law, compliance with Section 5 of the Voting Rights Act.

I write also to commend the Department of Justice and the Attorney General. I do not believe for a minute that intervening in the *LULAC* case before the Fifth Circuit constituted any sort of a waiver on the part of

23. I commend the judges who preside over these Courts for their efforts in reducing the total caseload in their respective areas. I am fully aware that the existence of these Courts is certainly in the best interest of the public, and I in no way wish to impede the progress of State District Judges.

the United States to continue to seek vigorous enforcement of the Voting Rights Act. The Attorney General is not ignoring the en banc decision. He is attempting to comply with the law as the Sixth Circuit has decreed and as he perceives the Voting Rights Act should be interpreted. Certainly, the Department of Justice has more things to do than monitor each Constitutional provision of the fifty states of the United States, each statute passed by those states, and the opinions of each district court and circuit court. All submissions in the case before this Court were relevant and material and, certainly, the State of Texas believed not only that preclearance had to be sought but that preclearance had not been obtained. It is inconceivable to me that the State of Texas would withdraw the submission if they thought as a matter of law or fact that the judgeships had been precleared. It is just as inconceivable to believe that the State would make a resubmission in October of 1990 if it felt that the matter had been precleared many months before. In my opinion, my two judicial bothers who sat with me on this panel are patently wrong.

At the risk of making this opinion too long, I cannot help but believe that the en banc decision in *LULAC* was incorrect. As a District Judge in the Fifth Circuit, I am bound by the en banc opinion, and will abide by it until such time as the Supreme Court reverses the opinion or the Congress makes changes in the Voting Rights Act.

The majority opinion here seeks to salve its conscience by pointing out that two of the judges of the courts involved are minorities. Just because one of the judges is a black female and another a Hispanic male does not make the opinion correct. I have no quarrel with either

of these individuals, and am sure they are both highly qualified and competent judges. The fact remains, however, that the Voting Rights Act does not speak to those holding the office, but rather speaks to the rights of voters. The voters in the respective districts of these two judges are, in my opinion, having their rights under the Act violated.

Shakespeare, in Sonnet 35 reflects my feelings about the current state of the law in the Fifth Circuit when it comes to the Voting Rights Act. He said:

> Roses have thorns, and silver fountains mud;
> Clouds and eclipses stain both moon and sun,
> And loathsome canker lives in sweetest bud.
> All men make faults.

The opinion in *LULAC* is indeed a thorn in the flesh of voters. The silver fountain of Voting Rights does indeed contain mud. This stains both moon and sun and is indeed a sore on one of the sweetest rights guaranteed by our Constitution. In the opinion of this writer, the *LULAC* en banc decision is reminiscent of the infamous *Dred Scott* decision,[24] which deprived many people of their rights and led to our most unfortunate historic conflict

I would hope that the Supreme Court of the United States will recognize this as a most important field of the law that needs their interpretation. It is hard to believe

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24. In Dred Scott v. Sandford, 19 How. 393, 394, 15 L.Ed. 691 (1857) the Supreme Court stated, "The plaintiff having admitted, by his demurrer to the plea in abatement, that his ancestors were imported from Africa and sold as salves, he is not a citizen of the state of Missouri according to the Constitution of the United States, and was not entitled to sue in that character in the Circuit Court."

that the voters in Mississippi, Louisiana, and Texas are afforded less rights than voters in the States that are in the Sixth Circuit, i.e., Kentucky, Michigan, Ohio, and Tennessee.

If the Supreme Court does not soon give us guidance, some citizens are going to be deprived of their Constitutional and statutory voting rights.

I DISSENT.